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No. 90-1398

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

XEROX CORPORATION, a New York Corporation,
Petitioner,
v.

PETER N. TOLLIVER, LEON A. WIATER, HELEN A. FORDHAM, DONALD SCHAEFER, WALTER L. PIDEK, JAMES CARROLL, LAWRENCE L. TRAVIS, WILLIAM BRANT, JAMES DAMMEN, CHARLES DOLCIMASCOLO, JOHN L. BENNETT, JOSEPH G. GOLOSSI, HAROLD SIEBERT, ALFRED E. RIZZARI, ALFONSE OLIVERI, PAUL J. MITTAK, RICHARD B. VAN MAAREN, and PAUL F. BRAUN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of the Xerox Corpora-

tion's petition for a writ of certiorari. Respondents Tolliver, *et al.*, have refused consent. In support of this motion, EEAC by the following shows that its brief brings relevant matter to the attention of this Court that has not been (or will not be) presented by the parties.

1. EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 230 major U.S. companies, as well as several associations which themselves have hundreds of corporate members. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. As employers, EEAC's members are subject to various equal employment laws, including the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, the statute at issue herein. Many EEAC members currently face difficult financial times, and have implemented or are considering the use of voluntary or involuntary separation programs. Inevitably, some separated employees will choose initially not to file suit challenging the separation, but, after seeing fellow employees pursuing claims of discrimination, may later decide to "piggyback" untimely claims onto the timely-filed charges of co-workers, or, if the Second Circuit's unprecedented decision is allowed to stand, maintain their *own individual actions* long after the ADEA's filing period has expired. Under such a rule, plaintiffs will be able to file individual lawsuits even if they have not filed timely

charges with the Equal Employment Opportunity Commission (EEOC), as long as their suits are based on "a" single timely filing, even if that filing took place several years before the plaintiffs' lawsuits. Under such an ill-founded rule, employers would never know the full number of plaintiffs, and would have to treat every case as a potential class action.

3. Because of its interest in the application of the nation's equal employment laws, EEAC has filed amicus briefs in many cases before this Court, including a number involving the proper interpretation of the ADEA. *See, e.g., Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854 (1989); *McLaughlin v. Richland Shoe Co.*, 108 S. Ct. 1677 (1988); *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985); and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). In addition to filing a brief in support of Xerox's petition for reconsideration in the Second Circuit below, EEAC also has filed briefs with other Courts of Appeals on the issue of piggybacking under the ADEA in *Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008 (7th Cir. 1988), and *Gray v. Phillips Petroleum Co.*, 858 F.2d 610 (10th Cir. 1988) (issue not reached by court). Thus, EEAC has an interest in, and a familiarity with, the concerns presented in Xerox's petition herein.

4. Because of its significant experience, EEAC is uniquely situated to brief this Court on issues beyond those of concern to the immediate parties. Indeed, EEAC's brief presents the relevant concerns of the business community and demonstrates the significance of this case generally. Accordingly, the brief brings relevant matters to the attention of the Court that will not be brought to the Court's attention by the parties.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae contingent upon the granting of the accompanying motion.[1] The brief supports the petition for a writ of certiorari filed in this case by Xerox, and urges reversal of the decision below.

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[1] A letter of consent on behalf of Petitioner Xerox Corporation has been filed with the Clerk of the Court. Respondents have refused consent.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is set forth fully in the preceding motion.

STATEMENT OF THE CASE

Because of increased competition and financial challenges, Xerox was required to decrease the size of its workforce through voluntary and involuntary reduction programs. The 18 plaintiffs herein all separated from Xerox between November 1, 1981, and July 11, 1983, months or years before contending that they had been unlawfully terminated in violation of the ADEA.

In early 1982, four former Xerox employees (who are not parties to the instant lawsuit) filed charges with the Equal Employment Opportunity Commission (EEOC) within the requisite 300 days of their separation from the company. Based on those charges, the four subsequently filed a lawsuit entitled *Lusardi v. Xerox Corp.* In 1983, the four timely-filed plaintiffs sought certification of the suit as a class action. In 1984, the district court judge conditionally certified the suit as an "opt in" class—a procedure unique to the ADEA that requires would-be class members to file written consents in order to become part of the class.[2] Three years later, however, District Judge Lechner decertified the class. 118 F.R.D. 351.

The plaintiffs herein never attempted to "opt into" the *Lusardi* case within 300 days of their separation from the company. A. 417.[3] Nor did any of them file a charge with the agency within 300 days of their separation. As noted by the district court below, "the dates of filing range from 392 days after the alleged discriminatory act

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[2] The "opt-in" provision is explained fully in Argument IB. below.

[3] Plaintiff Oliveri did attempt to opt into the *Lusardi* action within 300 days of his separation, but he did not fit within the definition of the *Lusardi* class.

(plaintiff Bennett) to 2,655 days thereafter (plaintiff Schaefer)." A. 407.[4] Nine others filed over 2,000 days after their leaving the company, and four have never filed a claim. A. 406-407.

The Third Circuit issued a writ of mandamus directing Judge Lechner to reexamine his decertification. 855 F.2d 1062. On remand, he reaffirmed that there was no discriminatory action common to all class members. 122 F.R.D. 463.

The 18 plaintiffs herein then filed individual ADEA lawsuits. But because of their failure to file claims within 300 days of their discharge, District Judge Larimer granted Xerox's motion to dismiss. Judge Larimer refused to permit the 18 plaintiffs to "piggyback" onto the timely-filed claims, noting that "it would be erroneous, especially on the facts of this case, to ignore Congress' well-expressed intention to bar suits brought on the basis of accusations of discriminatory motive which are leveled years after the adverse employment decision has been made." A. 412-413.

The Second Circuit reversed and remanded, greatly extending the concept of piggybacking beyond that recognized in any other circuit by concluding 1) that the so-called "single-filing rule" is available to ADEA plaintiffs just as it is to plaintiffs suing under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*; 2) that the single-filing rule may be used, not only by those joining an *existing* suit, but also by those initiating individual suits; and 3) that the administrative claims filed by the *Lusardi* plaintiffs were sufficient to secure the benefit of the single-filing rule for the 18 plaintiffs even if they were not similarly situated to the *Lusardi* plaintiffs, and even though the court did not have the com-

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[4] References to the Joint Appendix are referred to as "A" followed by the relevant page number(s).

plete *Lusardi* charge before it. *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057-1060 (2d Cir. 1990).

The Second Circuit stressed that its holding was not limited to the facts of the instant case, which involved the ability of decertified members of the *Lusardi* class to file separate lawsuits. The court stated that the real issue was whether the plaintiffs here can benefit from the timely charge filed by the *Lusardi* plaintiffs "irrespective of the class action that those plaintiffs endeavored to maintain." 918 F.2d 1052, 1056-1057. The Court then held that the single filing rule "may be used to permit an ADEA plaintiff to file his or her own lawsuit, rather than to join in a previously filed suit, either as co-plaintiff or intervenor." *Id.* at 1057. Accordingly, under the Second Circuit's holding, there is "no reason to require ADEA plaintiffs seeking to benefit from the single filing rule to join preexisting individual suits." *Id.* Thus, as long as the charging party defines its charge "broadly enough to include those who seek to piggyback on the claim", the Second Circuit will deem the charge sufficient to allow piggybacking even if the claimant does not purport to represent a class or others similarly situated. *Id.* at 1058.

The Second Circuit then denied Xerox's petition for rehearing and suggestion for rehearing in banc, and granted the company's motion for stay of mandate pending application to this Court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This Court should grant Xerox's petition for a writ of certiorari to overturn the Second Circuit's ill-conceived decision, which has broad implications beyond the facts of the instant case. That decision permits plaintiffs to bring individual ADEA lawsuits pursuant to the so-called "single-filing" rule in instances where they have not filed timely charges with the EEOC—indeed, even where the untimely suits are based on a single timely filing of a person not a party to the actions and where the

charging party is not even similarly situated to those attempting to piggyback on the charge. The Second Circuit's ruling improperly conflicts with the plain language of the ADEA, extends and conflicts with court interpretations in other circuits, and runs afoul of the policy buttressing the law.

Before commencing an action in the federal courts, the plain language of ADEA Section 626(d) requires a plaintiff to have filed a charge with the EEOC within 300 days of the alleged unlawful practice. Indeed, because the language in Section 626 is phrased as "shall be filed," the 300-day requirement operates, according to the district court below, as a "statute of limitations," A. 411-412, and is a "prerequisite to all actions under [the] ADEA." *Foster v. CBS Records, Inc.*, 109 F.R.D. 168, 169 (S.D.N.Y. 1986). These 18 plaintiffs failed to file charges of discrimination within this requisite period —indeed some have not filed charges at all—and are thus time-barred.

Some courts have adopted an exception to this strict filing requirement to further the purposes of ADEA Section 216(b). That section provides for an "opt-in" class action, whereby persons may join a suit by affirmatively consenting in writing. But these 18 are precluded from utilizing the so-called "piggybacking" exception because the *Lusardi* class was decertified and their opt-in status was lost.

The Second Circuit's decision, however, goes far beyond construing the piggyback exception developed under Section 216(b) to cover these plaintiffs. Indeed, the Second Circuit's decision adopts and extends what it calls the "single-filing rule" allegedly contained in 29 U.S.C. § 626(d). Under the Second Circuit rule, persons who have not filed timely charges, and who are not "similarly situated" to those who have, can still proceed with their own lawsuits. Unless accepted for review and overturned, the decision will pull this single-filing rule from its statu-

tory tethers by allowing "an ADEA plaintiff to *file his or her own lawsuit*, rather than to join in a previously filed suit." For example, here the court permitted the *Lusardi* charge to "suffice to secure the benefit of the 'single filing rule' for the 18 appellants" even though the Second Circuit never had the *Lusardi* charge before it, and even though the 18 plaintiffs here are not similarly situated to those in the *Lusardi* case. 918 F.2d at 1057 (emphasis added). And as the Second Circuit made clear, this result could occur even if a plaintiff in a lawsuit never attempted to intervene or join in a preexisting suit, or even if the timely charge was never part of an earlier action. Such a rule conflicts with the ADEA and improperly departs from the rules adopted in every other court of appeals.

In addition to resolving the split in the circuits, this Court should accept this case for review for a number of practical and policy reasons. The business community, which EEAC represents, is concerned that the Second Circuit's rule will actually destroy the viability of the EEOC's conciliation process, whereby employers, after being notified of the full extent of alleged discriminatory practices, are given a chance to rectify voluntarily alleged violations, thereby avoiding court action. Under the single-filing rule adopted by the court below, an employer would have to wait to determine if a single claim could mushroom into limitless other claims, and would have to wait indefinitely to know the potential magnitude of its liability.

Thus, the decision below has important implications extending beyond the unique circumstances of this particular case. It effectively requires employers to "treat all individual charges as potential class actions," *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986), and thereby "labor under the threat of a covert class action throughout the judicial proceedings," *id.* at 400-01. If

left standing, its unintended but inevitable result will be to remove much of the incentive for employers to use conciliation. This Court should not sanction such a result.

Rejection of the single filing rule also is necessary to ensure that employers are given formal notice of the charges against them, allowing them to conduct an appropriate defense. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982). In conducting an appropriate defense, an employer needs to be apprised of the scope of a charge in order to preserve records and secure witnesses. And, as the Fifth Circuit noted in *Edwards v. Kaiser Aluminum and Chemical Sales*, 515 F.2d 1195, 1199 (5th Cir. 1975), timely filing promotes "informal good faith negotiation and voluntary compliance, speedy and peaceful resolution of claims, preservation of evidence and records, and conserving court resources." Indeed, another compelling reason for this Court to accept this case is to "limit[] the chances for the filing of suits based on [a plaintiff's] subsequent motivations or reassessments." *Kloos*, 799 F.2d at 400. This timely filing requirement "is of *particular* significance in the age discrimination area, where every employed person over the age of forty is a potential plaintiff." *Id.* (emphasis added).

Accordingly, this Court should accept the case for review with an eye toward rejecting the single-filing rule adopted by the Second Circuit below.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S RULE—PERMITTING PLAINTIFFS TO PURSUE INDIVIDUAL CLAIMS OF DISCRIMINATION UNDER THE SO-CALLED "SINGLE-FILING" RULE EVEN THOUGH THEY HAVE FAILED TO FILE TIMELY EEOC CHARGES OR PROPERLY OPT INTO AN ACTION BROUGHT BY PLAINTIFFS WHO FILED TIMELY CHARGES —CONFLICTS WITH THE PLAIN LANGUAGE OF THE ADEA AND IMPROPERLY DEPARTS FROM THE RULES ADOPTED BY COURTS IN OTHER CIRCUITS

EEAC supports Xerox's petition for writ of certiorari because the Second Circuit has rendered a decision in conflict with decisions in other courts of appeals, and has so far departed from the existing "piggybacking" exception as to read the charge filing requirement out of the Act, calling for an exercise of this Court's power of supervision. Supreme Court Rule 10. Indeed, the Second Circuit stressed that its decision was not limited to the facts of this case, and stressed that "piggybacking" could be used by plaintiffs who were not similarly situated to the individual filing a timely charge, and where they never attempted to join or intervene in the initial suit. Unless accepted for review and overturned, the Second Circuit's ruling will result in unfair consequences unintended by the ADEA's Congressional drafters, and will lead to a severe negative effect on the way parties use conciliation and the way companies defend allegations of age discrimination.

A. Because No Plaintiff Filed A Timely Charge, The Second Circuit's Single-Filing Rule Conflicts With The Plain Language Of The ADEA's Filing Requirements

Section 626(d) of the ADEA requires a plaintiff to file a timely charge of discrimination with the EEOC before commencing an action in the federal courts. 29

U.S.C. § 626(d).[5] For purposes of this lawsuit, this "timely charge" period is "within 300 days after the alleged unlawful practice occurred," 29 U.S.C. § 626 (d) (2). Since the alleged unlawful practices occurred when the 18 plaintiffs separated from Xerox—between November 1, 1981 and July 11, 1983—all 18 had to file charges by mid-1984 at the latest, in order to preserve their rights. They did not. A. 406.

The statutory language requiring this timely filing is unequivocal. Section 626(d) uses the word "shall"—not "may" or "can." It states, "*No* civil action may be commenced . . . until . . . after a charge . . . has been filed . . . . Such a charge *shall* be filed . . . within 300 days after the alleged unlawful practice occurred . . .." *Id.* (emphasis added). As properly noted by the district court below, "the 300-day EEOC filing requirement operates as a statute of limitations, compliance with which is mandatory and rigorously enforced." A. 411-412. *Foster v. CBS Records, Inc.*, 109 F.R.D. 168, 169 (S.D.N.Y. 1986) (the timely filing is a "prerequisite to all actions under [the] ADEA"). Accordingly, since none of the plaintiffs herein complied with the filing requirement,

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[5] 29 U.S.C. § 626(d) states:

> *No civil action may be commenced* by an individual under this section *until* 60 days *after a charge* alleging unlawful discrimination *has been filed* with the Equal Employment Opportunity Commission. *Such a charge shall be filed*—
>
> * * * * *
>
> (2) in a case to which section 633(b) of this title applies, *within 300 days after the alleged unlawful practice occurred*, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, *the Commission shall* promptly notify all persons named in such charge as prospective defendants in the action and shall *promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.* (Emphasis added).

they are time-barred, and any rule to the contrary conflicts with the plain language of the statute.

B. No Plaintiffs May Piggyback Herein, And The Single-Filing Rule Should Not Be Used To Obviate The ADEA's Clear Statutory Language

Some courts have found an exception to this timely filing rule, the so-called "piggyback" exception. These courts have held that such an exception is necessary to further the purpose of 29 U.S.C. § 216(b), which allows persons to join a suit brought by one or more other persons "similarly situated" to themselves.[6] Under this provision . . . all plaintiffs in an ADEA representative action must affirmatively opt-in to the suit." *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1016 (7th Cir. 1988). As an "opt in" form of class action, it is thus distinct from the Fed. R. Civ. P. 23 "opt-out" class action used in Title VII litigation.

All 18 plaintiffs in this case opted into the *Lusardi* action, but the class initially containing these plaintiffs was decertified and their "opt in" status was lost. *Lusardi*, 118 F.R.D. 351, *reaffirmed*, 122 F.R.D. 463. Accordingly, none can avail himself of the so-called piggyback exception developed in connection with Section 216(b).[7]

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[6] 29 U.S.C. § 626(b) of the ADEA states that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of [the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*]." Section 216(b) provides as follows:

> [*A*]*ction* to recover [such] liability . . . *may be maintained* . . . in any . . . court of competent jurisdiction *by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.* No employees shall be a party plaintiff to any such action unless he gives his *consent in writing* to become such a party and such consent is *filed* in the court in which such action is brought.

29 U.S.C. § 216(b) (emphasis added).

[7] *See Kloos v. Carter-Day Co.*, 799 F.2d 397, 399 (8th Cir. 1986) (ADEA administrative filings may not serve as the basis for juris-

The Second Circuit's decision herein, however, goes far beyond construing the so-called piggyback exception to cover these plaintiffs. Indeed, the decision adopts and radically extends a "single-filing rule" allegedly contained in 29 U.S.C. § 626(d). As a result, persons who have not filed timely charges, and who are not "similarly situated" to those who have, can still proceed with a lawsuit. According to the decision, because the ADEA's administrative procedure is "modeled" on Title VII's procedure, and because the "single-filing rule" has been used in Title VII class actions, it is "equally appropriate to apply [the rule] to ADEA individual actions by analogy to its application to Title VII individual actions." 918 F.2d at 1057.

In fact, however, the decision goes far beyond any existing Title VII ruling. Unless accepted for review and overturned, the decision will pull this "single-filing rule" from its statutory tethers by allowing "an ADEA plaintiff to *file his or her own lawsuit*, rather than to join in a previously filed suit," and indeed will permit the *Lusardi* charge to "suffice to secure the benefit of the 'single filing rule' for the 18 appellants" even though the district court below never had the *Lusardi* charge before it, and even though the 18 plaintiffs here are not similarly situated to those in the *Lusardi* case. *Id.* (emphasis added).

The exception recognized by some courts to further the purposes of Section 216(b) cannot be so broad that it swallows the express language of Section 626(d). Section 626(d) states clearly that a charge must be filed with the EEOC within 300 days of the occurrence of the unlawful practice. The cases which have allowed an

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diction over opt-in class plaintiffs who never filed administrative charges); *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 755 (5th Cir. 1980); *Price v. Maryland Casualty Co.*, 561 F.2d 609, 610-11 (5th Cir. 1977) (Section 216(b) "opt-in" procedure must be used).

ADEA plaintiff who has not filed a timely charge to piggyback onto the timely-filed charges of another, require that a plaintiff has "opted in" pursuant to Section 216(b).[8] In addition, just because Title VII permits "single-filing" does not mean the same procedure is (or should be) permitted under the ADEA.

The amicus American Association of Retired Persons (AARP) argued below that the district court "mistakenly links" Section 216(b) with Section 626(d).[9] AARP Brief to Second Circuit at 8. AARP claimed that "[t]he one, *and only*, touchstone for an adequate charge is the sufficiency of notice to the EEOC so it can conciliate the charge." *Id.* at 9. But to ignore the plain language of Section 626(d) and expand the so-called piggyback exception by adopting the Second Circuit's "single filing" rule would read Section 626(d) right out of the statute and make it impossible for any meaningful conciliation to occur.

The EEOC, as amicus, conceded below that "Title VII's single filing rule has always been applied in situations where at least one plaintiff in the action in question had filed a timely charge." EEOC Brief to Second Circuit at 12. Yet the EEOC would extend Title VII's single-filing rule into this ADEA action, even though none of the 18

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[8] In 1978, Congress amended Section 626(d) to allow the filing of a "charge" rather than a notice of intent to sue, a change used by the Second Circuit below to support its incorporation of Title VII's single filing rule into the ADEA. 918 F.2d 1052, 1056. But, as explained fully in Xerox's brief to the Second Circuit below, the "change in language is not intended to alter the basic purpose of the notice requirement"—notice to the defendant and an opportunity to conciliate. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 12 (1978). See Xerox Brief at 27. Neither purpose was achieved by the Second Circuit's ruling.

[9] Indeed, the Fifth Circuit in *McCorstin* noted that the "district court was correct" when it "held that § 626(d) notice was a prerequisite to and complement of the class action mechanism provided by § [2]16(b)." 621 F.2d at 755.

plaintiffs herein filed a charge on time, as expressly required by ADEA, and further, despite the fact that the 18 plaintiffs cannot satisfy the limited piggyback exception recognized by some courts in ADEA opt-in actions. The EEOC's view that a plaintiff can "maintain an ADEA action so long as a timely charge has been filed," *id.* at 7, seemingly would permit piggyback plaintiffs to maintain ADEA actions five, ten, even fifteen or twenty years after "a" timely charge was filed, even if the charge was not filed in connection with these ADEA actions. Such a view does violence to the plain language of the statute and to the EEOC's function of conciliating charges. The Second Circuit's adoption of the EEOC's interpretation of single-filing rule should not stand.

C. The Second Circuit's Rule Improperly Departs From, And Indeed Conflicts With, The Rules Adopted In Other Circuits

Not only does the Second Circuit's decision read Section 626(d) out of the ADEA, but it departs from, and conflicts with all previous decisions in all other courts that have examined the concept of piggybacking.

For example, the Tenth Circuit in *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980), held specifically that "the ADEA authorizes grievants *who have complied with § 626(d)* to bring *representative actions* pursuant to § 216(b) on behalf of *'similarly situated'* employees. . ." *Id.* at 593 n.3. (emphasis added). Clearly, however, this case involves no plaintiffs who complied with § 626(d) by filing a charge.[10] Moreover, the *Lusardi* class was decertified expressly because none of the former opt-in claim-

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[10] *Mistretta* apparently would permit "similarly situated" plaintiffs to join an action so long as *one* plaintiff has "complied with the notice requirements of 29 U.S.C. § 626(d)." 639 F.2d at 593 n.3. Clearly, this is not such a case. More importantly, EEAC requests this Court to adopt the rule that *each* opt-in plaintiff must file a timely charge.

ants, including the plaintiffs herein, are similarly situated to the *Lusardi* plaintiffs.

And in *Bean v. Crocker National Bank*, 600 F.2d 754, 759 (9th Cir. 1979), the Ninth Circuit ruled that would-be plaintiffs who have not filed charges may "join in an action as unnamed parties *so long as a named plaintiff* has complied with the notice requirements of 29 U.S.C. § 626(d)." (Emphasis added). *See also Kloos*, 799 F.2d 397, 400 (8th Cir. 1986) ("we follow *Mistretta* and *Bean* and hold that it is sufficient for one or more plaintiffs to the action to have properly filed a charge"). Here, in direct conflict with the Tenth, Ninth and Eighth Circuits, the Second Circuit has permitted the plaintiffs to use the single filing rule even though none have filed the requisite Section 626(d) charges.

Indeed, all other circuits permitting a plaintiff to piggyback have done so only where there is some factual nexus between the plaintiffs attempting to piggyback and the person who has filed the timely charge. For example, in *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989), the Third Circuit noted that those attempting to piggyback worked in the same division with those who filed timely charges, and all had the same manager, were separated in conjunction with the same discriminatory scheme, and sought the same relief. A suit must be "limited to individuals similarly situated" to the filing party. *Price v. Maryland Casualty Co.*, 62 F.R.D. 614, 615 (S.D. Miss. 1972), *aff'd*, 561 F.2d 609 (5th Cir. 1977). *See also Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981).

As explained fully in Xerox's Petition for a Writ of Certiorari at pp. 40-52, the Second Circuit, in direct conflict with other courts, has effectively eliminated this nexus requirement, and improperly concentrates the breadth of the charge. Under its single filing rule, "the broader and more generic the language in the contents of the charge, the greater the number of persons who can piggyback on it." *Id.* at 42.

Accordingly, this Court should grant Xerox's petition for a writ of certiorari, not only to resolve the split in the circuits, but to put meaning back into the ADEA's charge filing provision.

II. COGENT POLICY REASONS SUPPORT THIS COURT'S ACCEPTANCE OF THIS CASE FOR REVIEW, AND COMPEL REJECTION OF THE SINGLE-FILING RULE FOR THESE UNTIMELY PLAINTIFFS

The Second Circuit's decision effectively obviates the ADEA's clear statutory language on the grounds that the "purpose of the charge filing requirement is fully served by an administrative claim that alerts the EEOC to the nature and scope of the grievance." 918 F.2d at 1057. As we now show, however, strong policy reasons instead favor enforcement of ADEA's strict filing requirements, and compel rejection of the single filing rule.

A. Enforcement Of The ADEA's Strict Filing Requirements And Rejection Of The Single-Filing Rule Will Encourage Employers To Conciliate Disputes Informally, Thereby Avoiding Litigation

The ADEA's charge filing requirement is designed to provide "an opportunity to eliminate alleged unlawful practices through informal methods of conciliation." H.R. Conf. Rep. No. 950, 95th Cong., 1st Sess. 12 (1978); *Kloos*, 799 F.2d at 400; *Foster*, 109 F.R.D. at 170. Then, when the EEOC presents the full extent of the allegations, the employer is given "a chance to rectify voluntarily the alleged violation, thereby avoiding a court action." *Foster*, 109 F.R.D. at 170. EEAC's member companies use conciliation to resolve disputes, and the ADEA's strict filing requirements properly facilitate that resolution. *See, Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 841 and n.11 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (conciliation is the ADEA's "most

favored method of enforcement"). In its decision below, however, the Second Circuit misconstrued the notion of conciliation, ruling that the ADEA's statutory purpose will be met with the single-filing rule. The implication, unexplainably, is that employers will be more likely to conciliate where, as here, a broadly worded charge has been filed.

If allowed to stand, the Second Circuit's ruling will actually destroy the viability of EEOC's conciliation process. An employer will never know whether a single claim could later mushroom into limitless other claims or whether the plaintiffs piggybacking on the charges will be similarly situated to the charging party. Therefore, an employer would not know with whom to conciliate. Indeed, an employer would have to wait indefinitely just to know the potential magnitude of its liability. Also, the EEOC would have no way of knowing what activities were encompassed by the conciliation. This Court should not sanction a rule that requires employers to "treat all individual charges as potential class actions," *Kloos*, 799 F.2d at 400, and thereby "labor under the threat of a covert class action throughout the judicial proceedings," *id.* at 400-01. The unintended result would be that employers would seldom use conciliation.

Accordingly, as a means of encouraging the full use of conciliation, this Court should accept the case for review with an eye towards rejecting the single-filing rule.

B. Rejection Of The Single-Filing Rule Is Necessary To Ensure Formal Notice To The Employer Of The Charges Against It, Permitting It To Preserve Records, Secure Witnesses, And Conduct An Appropriate Defense

The Second Circuit's decision below also erroneously implies that only the EEOC, not the employer, needs to be alerted to claims of discrimination. It states:

> When the *Lusardi* named plaintiffs filed their charges, the EEOC was on notice that Xerox stood accused of implementing its reduction in force during the years 1981 through 1983 by discriminating on the basis of age against those aged 40 to 70. The *Lusardi* plaintiffs did not purport to be complaining of isolated instances of age discrimination. Rather, they alerted the EEOC to a claim of age discrimination throughout the company's domestic operations.

918 F.2d at 1059. Conciliation is impossible if a single charge alleging nationwide discrimination relieves other plaintiffs of any obligation to file a timely charge that would apprise both the employer and the EEOC of the actual issues involved. Clearly, therefore, employers, as well as the EEOC, need to have formal notice of the charges against them in order to conduct an appropriate defense. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.[illegible] (1982).[11]

In conducting an appropriate defense, an employer needs to be apprised of the scope of a charge in order to preserve records and secure witnesses. As the Fifth Circuit noted in *Edwards v. Kaiser Aluminum and Chem-*

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[11] The defense of class claims "differ[s] from individual actions in a number of respects—most significantly in factual complexity and their potential for far-reaching monetary and equitable relief. . . ." *Anderson v. Montgomery Ward & Co., Inc.*, 40 F.P.D. 43,428, 43,430, *rev'd on other grounds and withdrawn*, 631 F. Supp. 1546 (N.D. Ill. 1986), *aff'd*, 852 F.2d 1008 (7th Cir. 1988). It was this fundamental distinction between the two types of claims that led the district court in *Anderson* to reason that "it is not a matter of indifference to an employer whether an employee files suit in his own behalf alleging a pattern of discrimination, or a class action containing similar allegations." *Id.* Since "it is reasonable for employers to respond differently" to the two types of claims, "[a]llowing the conversion of individual actions into class actions long after the litigation has begun, as plaintiffs would have the Court do here, would require employers to treat all discrimination suits as class action, a result that would be both wasteful and unfair." *Id.*

ical Sales, 515 F.2d 1195, 1199 (5th Cir. 1975), timely filing promotes "informal good faith negotiation and voluntary compliance, speedy and peaceful resolution of claims, preservation of evidence and records, and conserving court resources." Thus, the Second Circuit imposes an improper burden on Xerox of showing that conciliation "would have succeeded if Xerox had known the exact number of the names of those who would subsequently advance the same claim." 918 F.2d 1052, 1059. Rather, the Court should adopt a rule that allows successful conciliation as envisioned by the timely filing requirements of the ADEA. It is unfair to require Xerox or any employer to defend against claims of which they have not been fairly alerted.

C. Strict Time Requirements Are Necessary To Prevent Late Filings By Plaintiffs With "Subsequent Motivations Or Reassessments," A Concern Of Particular Importance Under The ADEA

Another compelling reason for this Court to accept this case to enforce the ADEA's strict filing requirement is to "limit[] the chances for the filing of suits based on subsequent motivations or reassessments." *Kloos*, 799 F.2d at 400.[12] This timely filing requirement "is of *particular* significance in the age discrimination area, where every employed person over the age of forty is a potential plaintiff." *Id.* (emphasis added). The *Foster* court stated:

> Such a limitation is of particular importance for age discrimination claims. Under this statute *everyone who lives out a substantial part of his life ex-*

[12] Amicus EEAC is not alleging improper motive on behalf of the former Xerox employees herein who, after failing to file timely charges, and failing to opt-in on time, are now getting, as stated by the district court below, a "free ride." A. 18. But such a scenario is entirely possible in the next case if this Court does not grant the petition and reverse the single filing rule.

> *pectancy is a potential plaintiff. Virtually everyone in the work force at some point fails to get something they might have wanted.* Whether the person was fired or merely failed to be chosen for a raise or promotion, he or she is a potential plaintiff if over 40. *By adopting the requirement of a prompt administrative charge, Congress unquestionably sought to limit the potential for the filing of suits based on tardy reassessments.*

109 F.R.D. at 170 (emphasis added). Accordingly, the prevention of late filings due to "subsequent reassessments," and the "particular importance" this limitation represents in ADEA claims, compels the adoption of a strict filing rule, and the rejection of the "single-filing rule."

CONCLUSION

For the foregoing reasons, EEAC respectfully urges this Court to grant Xerox's petition for a writ of certiorari.

Respectfully submitted,

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